Supreme Court, U.S.
FILED
MAR 8 1999
OFFICE OF THE CLERK

No. 98-1266

In The

# Supreme Court of the United States

October Term, 1998

DEBBIE L. BENNINGFIELD, PEGGY FRANKHOUSER and PAMELA M. GRANT,

*Petitioners,*

v.

SAM NUCHIA, CHIEF; C.O. BRADFORD, J.R. JONES; A. WADE RUNNELS; ROBERT T. FLEMING; RICHARD J. PFEIL,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## RESPONSE TO PETITION FOR WRIT OF CERTIORARI

BRIAN J. BEGLE
*Counsel of Record*
JOHN H. HIGHTOWER
OLSON & OLSON
3485 Three Allen
333 Clay Street
Houston, Texas 77027
(713) 759-0696
(713) 759-0342 Fax

*Attorneys for Petitioners*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTIONS PRESENTED FOR REVIEW

1. Was the Court of Appeals correct in finding that Petitioners' First Amendment claims failed to state a case against and overcome the qualified immunity of Individual Defendants, Sam Nuchia, C.O. Bradford, Jerry Jones and Richard Pfeil?

2. Was the Court of Appeals correct in finding that Petitioners failed to state a claim against any Individual Defendant under 42 U.S.C. § 1985 and/or that the intra-corporate conspiracy doctrine applied.

## LIST OF ALL PARTIES

The Petition for Writ of Certiorari accurately lists the parties to the proceeding.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW ..... i

LIST OF ALL PARTIES ..... ii

JURISDICTIONAL STATEMENT ..... 1

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED ..... 1

§ 1985. Conspiracy to interfere with civil rights .... 2

(1) Preventing officer from performing duties ... 2

STATEMENT OF THE CASE ..... 2

A. Procedural Background ..... 2

B. Statement of Facts ..... 4

1) The Court of Appeals was correct in finding that the retaliation claims raised against Nuchia failed to overcome his qualified immunity or state a claim under 42 U.S.C. § 1983 ..... 5

2) The Court of Appeals was correct in finding that the retaliation claims raised against Bradford failed to overcome his qualified immunity or state a claim under 42 U.S.C. § 1983 ..... 7

3) The Court of Appeals was correct in finding that the retaliation claims raised specifically against Jones and Pfeil failed to overcome their qualified immunity or state a claim under 42 U.S.C. § 1983 ..... 8

4) The Court of Appeals found that there was a fact issue precluding dismissal of Fleming and Runnels ..... 8

TABLE OF CONTENTS – Continued

Page

5) The Petition contains a number of other misstatements and omissions of fact which are corrected or clarified by the following..... 9

REASONS FOR DENYING WRIT ..... 11

ARGUMENT I. This Fifth Circuit ruling is in conformance with *Rutan v. Republican Party of Illinois* and the general state of First Amendment law ..... 12

ARGUMENT II. The Fifth Circuit's opinion in this case does not reflect a conflict with the holding in *Pickering* nor does it illustrate a restrictive interpretation of actionable conduct under the First Amendment ..... 14

ARGUMENT III. The decision in this case is not in conflict with other Courts of Appeals nor Supreme Court precedent and presents no basis for further refinement of First Amendment retaliation claims..... 16

ARGUMENT IV. The relevant allegations in this case fail to state a conspiracy claim with or without consideration of the "intra-corporate conspiracy" doctrine..... 20

CONCLUSION ..... 23

APPENDIX

Appendix A

Affidavit of Sam Nuchia, Chief of Police....App. 1

# TABLE OF AUTHORITIES

Page

CASES

*Agosto-de-Feliciano v. Aponte-Roque*, 889 F.2d 1209 (1st Cir. 1989) (*en banc*) ..... 18

*Bell v. Showa Denko*, 899 S.W.2d 749 (Tex.App. – Amarillo 1995 writ denied) ..... 11

*Benningfield et al. v. City of Houston et al.*, 157 F.3d 369 (5th Cir. 1998) ..... *passim*

*Bernheim v. Litt*, 79 F.3d 318 (2nd Cir. 1996) .....18, 19

*Bickel v. Burkhart*, 632 F.2d 1251 (5th Cir. 1980) ..... 20

*Click v. Copeland*, 970 F.2d 106 (5th Cir. 1992) ..... 20

*Dahm v. Flynn*, 60 F.3d 253 (7th Cir. 1995) ..... 19

*Jeffers v. Barnes*, 20 F.Supp.2d 404 (N.D.N.Y 1998) .... 17

*Nelson Radio v. Motorola*, 200 F.2d 911 (5th Cir. 1952) *cert. denied*, 345 U.S. 925 (1953) ..... 22

*Nunoz v. Vlaskamp*, 147 F.3d 867 (9th Cir. 1998)...17, 18

*Rodriguez v. Holmes*, 963 F.2d 799 (5th Cir. 1992)..... 11

*Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990) ..... 4, 12, 13, 14

*Sharp v. City of Houston*, 164 F.3d 923 (5th Cir. 1999) .....16, 20

*Travis v. Gary Community Health Center*, 921 F.2d 108 (7th Cir. 1990) *cert. denied*, 502 U.S. 812 (1991) ..... 22

*Wilson v. Garcia*, 471 U.S. 260 (1985) ..... 11

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

42 U.S.C § 1983 .....3, 5, 16, 18

42 U.S.C § 1985 ..... 1, 2, 3, 12, 20, 21

Supreme Court Rule 15.2 ..... 4

Federal Rules of Civil Procedures Rule12(b)(6) ...18, 19

Federal Rules of Civil Procedures Rule 50..... 19

*Texas Local Government Code* § 143.123(f)..... 7

## JURISDICTIONAL STATEMENT

Petitioners seek to invoke the jurisdiction of the Supreme Court of the United States pursuant to Rule 10 of the Rules of the Supreme Court of the United States, subsections (a) and (c). This rule indicates that the Court will consider review of decisions that:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> * * *
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

None of these circumstances exist in this matter, and this Court should not exercise jurisdiction over this matter. Respondent urges denial of the petition on the basis of lack of jurisdiction of this Court.

## CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The provisions of 42 U.S.C. § 1985(1) were not included in the Petition and are provided below.

**§ 1985. Conspiracy to interfere with civil rights**

**(1) Preventing officer from performing duties**

If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties; * * *

## STATEMENT OF THE CASE

### A. Procedural Background

The Petition for Certiorari arises out of an interlocutory appeal of the denial of a motion for summary judgment asserting qualified immunity of the six Individual Defendants. The Fifth Circuit Court of Appeals reversed, in part, the District Court's denial of qualified immunity and dismissed Sam Nuchia, C.O. Bradford, J.R. Jones, and Richard Pfeil from the case entirely. A. Wade Runnels and Robert T. Fleming were dismissed from the 42 U.S.C. § 1985 claims but were not dismissed from all First Amendment claims against them.

Petitioners had initially raised claims of sex discrimination and retaliation under the Texas Commission on Human Rights Act ("TCHRA"), violations of Texas Civil Service Law, Intentional Infliction of Emotional Distress, Tortuous Interference with Business Relations, Defamation, Premises Liability, Negligent Supervision, and Invasion of Privacy against the City of Houston (the City) and the Individual Defendants in State District Court on August 27, 1993. On December 1, 1995, Complainants amended their lawsuit to add causes of actions under the First Amendment, 42 U.S.C. § 1983 and 42 U.S.C. § 1985. Defendants removed the case to Federal Court on December 5, 1995, based upon the newly asserted federal claims.

On October 23, 1996, Defendants filed a Motion for Summary Judgment in Federal Court based, among other things, upon the Individual Defendants' qualified and official immunity. On March 3, 1997, Magistrate Calvin Botley issued a Recommendation regarding Defendants' motion indicating that immunity was appropriate for all Individual Defendants on all causes of action except sex discrimination under the TCHRA and Tortuous Interference with Business Relations. (Pet. App. at 97a, 118a-119a). On April 11, 1997, U.S. District Court Judge Nancy F. Atlas conducted a hearing regarding Defendants' motion, denying the immunity defenses to the First Amendment, 42 U.S.C. § 1985, Tortuous Interference with Business Relations and Intentional Infliction of Emotional Distress (as to Grant and Benningfield only). The remaining claims against the Individual Defendants were dismissed by the Court or withdrawn by Petitioners. The Court's findings were announced in open court in lieu of

a specific written order. (Pet. App. at 20a-21a). Respondents appealed the denial of the Individual Defendants' qualified immunity. The appeal was granted, in part.

### B. Statement of Facts

The "Statement of the Case" section of the Petition (Pet. at 3-15) contains a number of incomplete assertions of fact, inaccuracies and contradictions which Respondents are obliged to point out and correct under Supreme Court Rule 15.2. In addition, Petitioners' "Statement of the Case" provides a plethora of allegations most of which are stale and/or outside the relevant time period for the causes of action asserted. (Pet. App. at 152a-179a).

Petitioners' retaliation claims consist of several trivial acts specifically attributable to the Individual Defendants. Petitioners attempt to conjure up a cause of action by adding to this mixture, allegations that are emotionally charged but that are also obviously time barred, not attributed to any individual, and non-relevant to the determination of the qualified immunity of these Individual Defendants. Petitioners' utter failure to provide any evidence of direct involvement by the Individual Defendants in any relevant and non-trivial adverse act is fatal to their case. Petitioners' proposed "phantom connection" approach to individual liability is not promulgated in *Rutan*,[1] nor any other Supreme Court precedent, and provides no basis for overturning the Court of Appeals dismissal of the retaliation claims against the Individual Defendants.

---

[1] *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 65 (1990).

It must first be noted that Petitioners' reliance upon an asserted error on the part of the Court of Appeals in requiring and/or defining an adverse employment action is not applicable to the claims of Pam Grant. The Court of Appeals specifically found that there was no nexus between Grant's claims of retaliation and any protected speech in which she may have engaged. *Benningfield et al. v. City of Houston et al.*, 157 F.3d 369, 376 (5th Cir. 1998). Any question as to whether or not alleged retaliatory acts toward Grant rise to the level of a constitutional violation is moot because Petitioners could not establish the nexus required under a § 1983 claim.

A determination of the appropriateness of the Court of Appeals decision must therefore be based upon the specific allegations raised against the Individual Defendants by Benningfield and Frankhouser. The following Statement of the Case addresses those specific allegations of retaliation raised against the individuals in this appeal. The following review of Petitioners' relevant allegations and Defendants' responses illustrate that the Fifth Circuit's determination on qualified immunity was in accord with current law in this Court and without conflict in the Circuit Courts of Appeal.

**1) The Court of Appeals was correct in finding that the retaliation claims raised against Nuchia failed to overcome his qualified immunity or state a claim under 42 U.S.C. § 1983.**

Nuchia was the Chief of Police and a member of the Houston Police Department (HPD) during only a portion of the time period in which Petitioners claim they were

discriminated and/or retaliated against as members of the Identification Division. (Pet. App. at 290a). Petitioners claim that Nuchia retaliated against them when he (1) failed to call for promotional examinations in a timely manner (Pet. at 10); (2) allowed Assistant Chief Jones to conduct an investigation of Benningfield's Absence Without Leave (AWOL) (Pet. at 11); (3) referred Benningfield to the Administrative Personnel Committee (APC) for a review of her fitness for duty following her AWOL and prior to promoting her to supervisor (Pet. at 12); (4) divided Benningfield's IAD complaint into an audit of her claims of administrative improprieties and her claims of misconduct by her supervisor (Pet. at 11); (5) gave Runnels and Fleming copies of the allegations Frankhouser and Benningfield raised against them (Pet. at 9); and, (6) overruled a recommendation that Benningfield be removed from the Identification Division during the IAD investigation (Pet. at 11).

Nuchia did not return to the HPD from the U.S. Attorney's office until March of 1992. (Pet. App. at 163a). Benningfield alleges retaliation in delaying a promotional exam but ignores both the fact that she was not the only employee eligible to test for the promotion and that the test was given just over a year after Nuchia returned to HPD as Chief and less than one year after she brought the issue to his attention.[2] (Pet. App. at 166a and 206a). Benningfield took the test and became eligible for promotion on or about June 11, 1993. (Pet. App. at 206a). However, because of a separate incident, Nuchia ordered that

---

[2] The Texas Civil Service Law violations were not raised against the individual Defendants. (Pet. App. at 60a).

her fitness for duty be evaluated by the APC prior to considering her for the promotion to supervisor. (Pet. App. at 206a). Benningfield's inference that referral to the APC is a disciplinary act is contradicted by the fact that she was immediately promoted following her affirmation of fitness by the APC. She was provided with retroactive pay and seniority to the time she was eligible for the promotion. (Response. App. at 1a-2a).

Benningfield claims that Nuchia retaliated against her by having her AWOL investigated through her Assistant Chief as per standard operating procedures, but fails to add that he also referred her to the Internal Affairs Division (IAD) for investigation of the harassment claim that she alleged caused the AWOL. (Response App. at 1a-2a). The allegations of misconduct in the IAD complaint were provided to the accused parties (Fleming and Runnels) in accordance with standard operating procedures and state law provisions regarding investigations of police officers. *Texas Local Government Code* § 143.123(f). The investigation was ordered divided into administrative issues (mismanagement) and harassment allegations based upon the expertise and jurisdiction of the two separate investigative units involved. (Response App. at 1a-3a). Per departmental policy, Benningfield was offered a transfer to another Identification Division location pending the outcome of the IAD investigation but refused this offer. (Pet. App. at 204a-205a).

**2) The Court of Appeals was correct in finding that the retaliation claims raised against Bradford failed to overcome his qualified immunity or state a claim under 42 U.S.C. § 1983.**

Bradford was an Assistant Chief over the Identification Division during a portion of the relevant time

period. The only relevant allegation against him in the Petition is that he conducted his own investigation into Petitioners' allegations of discrimination/retaliation and mismanagement in the Identification Division. (Pet. at 8). Bradford, as any good manager would do, conducted an investigation into complaints from within the division soon after his appointment as Assistant Chief over the division. He conducted a number of work group sessions with Identification Division personnel on or around October 11, 1991, seeking solutions to complaints raised in the division. (Pet. App. at 161a).

**3) The Court of Appeals was correct in finding that the retaliation claims raised specifically against Jones and Pfeil failed to overcome their qualified immunity or state a claim under 42 U.S.C. § 1983.**

Jones was also an Assistant Chief and was over the Identification Division for a period of time following Bradford's reassignment from that command. Pfeil was the supervisor placed over Benningfield and the Automated Fingerprint Identification System (AFIS) following her inexplicable AWOL incident. The Petition raises no specific allegations of retaliation against either Jones or Pfeil.

**4) The Court of Appeals found that there was a fact issue precluding dismissal of Fleming and Runnels.**

The Court of Appeals opined that Runnels' decision to place a supervisor over Benningfield and the AFIS

system after her AWOL incident could possibly be construed as a demotion based upon retaliation and consequently did not dismiss the First Amendment claim against Runnels. The Court of Appeals also opined that Fleming's decision to make one fingerprint training assignment, previously shared by Frankhouser and a coworker, a rotational assignment among all Latent Fingerprint Examiners could arguably be considered a demotion based upon retaliation and as a result did not dismiss the First Amendment claim against Fleming. *Benningfield et al. v. City of Houston et al.*, 157 F.3d at 377. These issues remain to be resolved by a factfinder.

**5) The Petition contains a number of other misstatements and omissions of fact which are corrected or clarified by the following.**

Benningfield indicates she was falsely accused of stealing criminal histories. (Pet. at 6). She fails, however, to mention that the act allegedly occurred in 1985, is time barred and resulted in no disciplinary action against her. (Pet. App. at 189a). Benningfield filed suit on August 27, 1993. (Pet. App. at 178a).

Benningfield also indicates that while she was assigned to AFIS she was improperly required to report directly to Runnels, outside the chain of command.[3] (Pet. at 9). She later contradicts this assertion by claiming an adverse act occurred when this situation was "rectified"

---

[3] Runnels, in fact, was the Division Commander at the time and was clearly within Benningfield's chain of command. (Pet. App. at 187a-188a).

and a supervisor was placed in the chain of command between her and Runnels. (Pet. at 11).

Benningfield complains that in 1991 she was ordered to train new employees on the nightshift. (Pet. at 10, Pet. App. at 157a). She alleges that this was an adverse act but fails to mention that this complaint is time barred. She also fails to acknowledge that when she complained about the arrangement she was released from the responsibility and the training duty was assigned to other officers. (Pet. App. at 191a).

Benningfield alleges that she was denied leave to attend educational conferences but fails to mention the fact that she and Frankhouser had attended many such conferences both prior to and after the denied request because of her position with AFIS. Benningfield asserts that she was denied direct contact with Printrak, an AFIS related contractor, but fails to recognize that this was after a manager was appointed over herself and AFIS, and that such contact would logically be made with the manager. (Pet. App. at 197a-198a).

Benningfield complains that the management review threatened her position with AFIS because it recommended that a supervisor be placed over the system but she simultaneously touts any findings of the review that are critical toward the management of the division. (Pet. at 8 and 10).

The majority of Frankhouser's claims are dated in Petitioners' timeline[4] and are barred by the applicable

---

[4] Petitioners' timeline, replete with hearsay, was never offered as corroborative evidence but is used here to show the chronology of the allegations.

two year statute of limitations. *Wilson v. Garcia*, 471 U.S. 260, 267 (1985); *Rodriguez v. Holmes*, 963 F.2d 799, 803 (5th Cir. 1992); *Bell v. Showa Denko*, 899 S.W.2d 749 (Tex.App. – Amarillo 1995 writ denied). She alleges that she was accused of sabotaging the AFIS system in 1991 (Pet. App. at 158a), denied overtime pay in December of 1991 (Pet. App. at 162a), and provided unbearable workloads in 1985 (Pet. App. at 152a) and 1990 (Pet. App. at 155a). She was allegedly accused of taking unauthorized vacation time in May of 1991 (Pet. App. at 264a), and accused of using profanity toward her supervisor in March of 1992. (Pet. App. at 266a). Frankhouser admits that her evaluation was raised back to its previous level after she brought the issue to the attention of Runnels. (Pet. App. at 266a) Frankhouser filed suit in this case on April 5, 1994. (Pet. App. at 179a). All of the above assertions by Frankhouser took place more than two years prior to her filing suit.

## REASONS FOR DENYING WRIT

Petitioners assert, as the basis for granting Writ, many allegations that the Court of Appeals could not have considered due to the statute of limitations and/or their failure to attribute the alleged acts to any individual defendant. The allegations of retaliation attributable to the Individual Defendants dismissed from this case by the Court of Appeals do not rise to the level of a Constitutional infringement under Supreme Court precedent or under the law established in other circuits. There is no unsettled issue or conflict between circuits presented by

this case and thus, there is no basis for this Court to intervene in this action.

Petitioners' assertion that this case points out a conflict in the law as to the application of 42 U.S.C. § 1985 is similarly without basis. Petitioners fail to assert relevant allegations that state a conspiracy claim. The Fifth Circuit recognizes a "personal motive" exception to the intracorporate conspiracy doctrine, but found that it did not apply in this case. Petitioners' call for recognition of a "mixed motive" exception is a red herring because the Court of Appeals found that there was **no** class based animus shown to support the § 1985 claim. This issue presents no basis for interpretation by the Court. There is no conflict with Supreme Court precedent or with other circuits on this issue. There is only Petitioners' erroneous claim that the Court of Appeals misinterpreted the evidence before them.

## ARGUMENT I.

**This Fifth Circuit ruling is in conformance with *Rutan v. Republican Party of Illinois* and the general state of First Amendment law.**

The Court of Appeals properly determined that the allegations raised against Nuchia, Bradford, Jones and Pfeil did not rise to the level of constitutional violations under the First Amendment. Those specific allegations raised by Petitioners against these Respondents are addressed in the Statement of the Case above.

This Court held that promotion, transfer, recall from layoff and hiring decisions may not be based upon political party affiliation. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 65 (1990). There is nothing in the Court of Appeals decision in this case which is in conflict with that ruling. Petitioners argue that the Court should expand the conduct actionable under the First Amendment to virtually anything that the Petitioners subjectively perceive as negative. They even go so far as to assert that a time barred claim regarding working paid overtime should be considered a constitutional violation under *Rutan*. (Pet. at 19). The *Rutan* ruling, to the contrary, reflects a carefully crafted approach for establishing a constitutional violation with actions that have a real and detrimental effect upon an employee's job.

None of the lower court cases cited by Petitioners find that trivial acts can establish a constitutional harm. Petitioners' claims, when viewed objectively without the emotional and incendiary context of vague and generic accusations, attributed to each specific defendant are trivial, conclusory, and insufficient to establish a constitutional violation.

Petitioners were not fired from their jobs nor were they constructively discharged. *Benningfield et al. v. City of Houston et al.*, 157 F.3d 369, 378 (5th Cir. 1998). The fact that they were not able to attend every seminar they wanted to attend; that Benningfield, along with every other eligible member of the division, had to wait for promotional exams to be offered; that Benningfield was investigated for an admitted AWOL and was required to

have her fitness for duty determined after this "breakdown" and prior to promotion to supervisor in accordance with state law, are not evidence of constitutional violations. A cause of action is not created just because virtually any time Petitioners disagreed with a management decision they personalized and internalized the act as retaliation.

Petitioners have failed to illustrate any conflict between the Fifth Circuit's ruling in this case and that provided by the *Rutan* Court. There is no basis for this Court to grant a Writ of Certiorari pursuant to Petitioners' first argument.

## ARGUMENT II.

**The Fifth Circuit's opinion in this case does not reflect a conflict with the holding in *Pickering* nor does it illustrate a restrictive interpretation of actionable conduct under the First Amendment.**

Petitioners' assertion that the Fifth Circuit's decision in this case was improper due to rigid adherence to a list of actionable offenses for asserting a First Amendment claim is in error. The Court of Appeals found that the relevant allegations of Benningfield, Grant[5] and Frankhouser did not reach the level of a constitutional violation.

---

[5] There was no nexus between Grant's claims of retaliation and any protected speech. *Benningfield et al. v. City of Houston et al.*, 157 F.3d at 376.

Frankhouser was not subjected to a constructive discharge.[6] *Benningfield et al v. City of Houston et al*, 157 F.3d at 378. Petitioners' timeline indicates that during the two year statute of limitations period, Frankhouser alleges only one incident of retaliation, other than the removal of exclusive training duties that the Fifth Circuit deemed a potential retaliatory constitutional violation by Defendant Fleming. That incident, allegedly occurring in July of 1992, was Runnels' requirement that Benningfield and Frankhouser share a room while attending a Printrak conference. (Pet. App. at 166a) This singular allegation, not having been raised against any individual dismissed by the Fifth Circuit, provides no basis for Petitioners' claim that the Fifth Circuit unduly restricts those claims actionable under the First Amendment or for Petitioners' alarmist fear that under this opinion the "First Amendment rights of all public employees will be functionally eradicated".

There are allegations alluded to in Petitioners' timeline but not addressed in the Petition directly which are purported to fall within the two year time period prior to the date Benningfield filed suit. Benningfield's allegations against the four dismissed Individual Defendants, not previously addressed herein, are that: (1) Bradford laughed at her complaints on January 25, 1992; (2) Pfeil ordered her to train him on AFIS on August 31,

---

[6] Petitioners assert that Frankhouser's constructive discharge was denied because Benningfield remains with the Department. (Pet. at 13). In reality, the Court held that Frankhouser's allegations were insufficient to support a constructive discharge claim. *Benningfield et al. v. City of Houston et al.*, 157 F.3d at 378.

1992; (3) Pfeil held her accountable for downtime on AFIS on September 16, 1992; (4) Pfeil listened to her phone calls and opened business mail addressed to her in September of 1992; and, (5) Pfeil moved an office file cabinet with some of her documents in it on June 14, 1993 (Pet. App. at 162a, 168a, 169a, 177a, and 192a).

It is clear from Petitioners' own documentation, that the Fifth Circuit opinion did not turn on a rigid interpretation of adverse employment action but upon the fact that those allegations relevant to the Individual Defendants dismissed from this case were trivial. *Benningfield et al. v. City of Houston et al.*, 157 F.3d at 376. The Fifth Circuit Court of Appeals explicitly refutes Petitioners' contention regarding a "bright line test" (Pet. at 21) for allegations actionable under the First Amendment claims by holding that they "have not held this list to be exclusive and do not do so now". *Sharp v. City of Houston*, 164 F.3d 923, 933, n. 21 (5th Cir. 1999). Petitioners' second argument provides no grounds upon which this Court should exercise jurisdiction in this case.

## ARGUMENT III.

**The decision in this case is not in conflict with other Courts of Appeals nor Supreme Court precedent and presents no basis for further refinement of First Amendment retaliation claims.**

There is no basis for Petitioners' assertion that the trivial acts at issue in this case would support a § 1983 action in this Court or any federal court of appeals. While there is some variation in terminology between the circuits, the basic requirements are generally consistent and

certainly do not encompass claims such as those asserted by Petitioners herein.

*Jeffers*, a New York district court case cited by Petitioners (Pet. at 23), holds that actions which amount to a constructive discharge will support § 1983 claims against Individual Defendants. *Jeffers v. Barnes*, 20 F.Supp.2d 404, 414 (N.D.N.Y 1998). The "facts" in *Jeffers* differ greatly from the relevant allegations raised in this case. Most obviously, the constructive discharge claim raised by Frankhouser has been dismissed[7] and Benningfield is still employed by the Houston Police Department. *Benningfield et al v. City of Houston et al*, 157 F.3d at 378. There is no relevant allegation in this case that would support a finding of the "intolerable working conditions" found in *Jeffers*. The *Jeffers* holding provides no basis for Petitioners' assertion that this case would have been decided differently in another circuit.

The *Nunoz* case also involved a number of seemingly egregious allegations, the majority of which were, as in this case, time barred (Pet. at 24). *Nunoz v. Vlaskamp*, 147 F.3d 867, 870 (9th Cir. 1998). In explaining what actions might rise to the level of a constitutional violation, the Court stated that, "Federal Court is not the appropriate forum in which to review the multitude of personnel decisions that are made on a daily basis by public agencies". *Nunoz v. Vlaskamp*, 147 F.3d at 874. The *Nunoz* Court specifically found that mere threats and harsh words are insufficient to create a constitutional violation and the

---

[7] The dismissal of the constructive discharge claim was not raised in this appeal.

individual must demonstrate the loss of a valuable government benefit or privilege. *Nunoz v. Vlaskamp*, 147 F.3d at 875. Such a loss has not been demonstrated by Petitioners and thus *Benningfield* is not in conflict with *Nunoz*.

The "landmark" *Agosto* case merely provided a list of potential situations that would cause an "unreasonably inferior" job situation. (Pet. at 24). *Agosto-de-Feliciano v. Aponte-Roque*, 889 F.2d 1209, 1219 (1st Cir. 1989) (*en banc*). The actions that fail to rise to the level of a constitutional violation in this case are, (1) losing job related "perks"; (2) a substantial narrowing of job duties; (3) removal of policy making authority; and (4) loss of freedom and work independence. *Agosto-de-Feliciano v. Aponte-Roque*, 889 F.2d at 1219. The only acts that the Court found *might* create such a situation included (1) a permanent and demeaning job assignment; and (2) daily criticism coupled with a lack of guidance, a transfer to an undesirable place and spurned requests for assistance. *Agosto-de-Feliciano v. Aponte-Roque*, 889 F.2d at 1219. Again, there are no facts presented that would create any such potential violations, consequently, this case presents no conflict with the ruling in *Benningfield*.

The *Bernheim* case dealt with a 12(b)(6) Motion to Dismiss and therefore was based upon review standards different than those in this case. (Pet. at 24). The Court found that the allegations could have stated a demotion claim to support the retention of the § 1983 claims. *Bernheim v. Litt*, 79 F.3d 318, 325 (2nd Cir. 1996). Petitioners quote this case for the proposition that "pruning" trivial complaints to determine the viability of a cause of action is improper. (Pet at 25). Petitioners chose to ignore the remainder of the holding that indicates that such

"pruning", while discouraged at the 12(b)(6) Motion to Dismiss level, is appropriate at the Rule 50 level as it was applied in *Benningfield*. *Bernheim v. Litt*, 79 F.3d at 326.

The *Blum* quote (Pet. at 25) is also taken out of context. This case holds that emotional distress should be a consideration in determining damages but not in the determination of a Constitutional violation as asserted by Petitioners. *Bernheim v. Litt*, 79 F.3d at 326.

The requirement that an individual be deprived of some valuable job benefit is a consistent requirement in the cases cited by Petitioners. The *Dahm* case (Pet. at 25) found that decreasing job responsibilities could, in some cases, constitute a demotion to support the § 1983 claims. *Dahm v. Flynn*, 60 F.3d 253, 258 (7th Cir. 1995). The Court pointed out, however, that the holding was new to the circuit and therefore failed to overcome the defendant's qualified immunity. *Id.* Similarly, even if Petitioners in this case were successful in having trivial acts proclaimed constitutional violations, such action would not overcome their qualified immunity because public officials "need not predict the law's evolution, need not know that in the fight between broad and narrow reading of a precedent the broad reading will be ascendant". *Dahm v. Flynn*, 60 F.3d at 258.

The Petitioners' primary focus is upon a broadening of the actionable conduct under the First Amendment. The opinions cited in the Petition, including those discussed above, require a case by case analysis to determine the true effect of alleged acts upon an employment case. While recognizing that some actions short of termination or constructive discharge could rise to the level of a

constitutional violation, none of the cases find that trivial actions, such as those included in the relevant allegations asserted by Petitioners, rise to the level of a constitutional violation.

Despite Petitioners' claim to the contrary, the Fifth Circuit also recognizes the possibility that allegations of less egregious behavior may constitute a constitutional violation. The Fifth Circuit has held that an employee could establish a § 1983 deprivation by showing that his employer altered an important "condition of employment." *Click v. Copeland*, 970 F.2d 106 (5th Cir. 1992), citing *Bickel v. Burkhart*, 632 F.2d 1251 (5th Cir. 1980). Most recently the Fifth Circuit determined that even a voluntary transfer could meet the standard for a constitutional violation. *Sharp v. City of Houston*, 164 F.3d at 934. The Courts have indicated that the allegations must be viewed on a case by case basis as in this case. The Fifth Circuit determined that the relevant claims failed to alter an important condition of Petitioners' employment and thus failed to state a claim against the Individual Defendants dismissed from the case. Failing such a minimum threshold, there is then no basis for the Supreme Court to intervene in this matter.

## ARGUMENT IV.

**The "Intra-Corporate Conspiracy Doctrine" is appropriate and should be adopted by this Court but this case fails to provide a proper forum because the relevant allegations fail to state a conspiracy claim with or without consideration of the doctrine.**

Petitioners' claim under 42 U.S.C. § 1985(1) fails because they are not federal officials and the section does

not apply to state officials. 42 U.S.C. § 1985(1); *Benningfield et al. v. City of Houston et al.*, 157 F.3d at 378.

Petitioners' claims under 42 U.S.C. § 1985(3) and to the extent they raise them, § 1985(2) claims, were dismissed because they failed to raise relevant allegations of a class based conspiracy as required to state a claim under those sections. *Benningfield et al. v. City of Houston et al.*, 157 F.3d at 379. Petitioners asserted in their brief to the Fifth Circuit, that Runnels intimidated and retaliated against them "because their reports of his [Defendant Runnels'] father's misconduct forced his father's resignation.[8]" (Appellee's Brief at 31). Petitioners claimed that the department assisted in the cover-up and perpetuation of the intimidation and retaliation aimed at them because of this complaint. (Appellees' Brief at 32). Petitioners also assert retaliatory conduct for later statements that they made which were critical of management and Defendant Runnels in particular. Petitioners, however, fail to articulate how the individual sporadic and unrelated acts, that are not time barred, combine to illustrate a conspiratorial meeting of the minds of the Individual Defendants, to constitute a conspiracy against the Petitioners or a protected class. The Court of Appeals agreed that these allegations fail to provide an allegation of a class based animus as required under § 1985(2) or (3). *Benningfield et al. v. City of Houston et al.*, 157 F.3d at 379.

---

[8] Audra Runnels preceded Defendant Runnels as Administrator of the Identification Division. After Audra Runnels' resignation, Defendant Runnels, his son, placed highest on the open, competitive promotional test for the position and as a result he was promoted to the position of Administrator.

Additionally, managers of a corporation jointly pursuing its lawful business do not become "conspirators" when acts within the scope of their employment are said to be discriminatory or retaliatory. *Travis v. Gary Community Health Center,* 921 F.2d 108, 110 (7th Cir. 1990) *cert. denied,* 502 U.S. 812 (1991), *Nelson Radio v. Motorola,* 200 F.2d 911 (5th Cir. 1952) *cert. denied,* 345 U.S. 925 (1953).

The intra-corporate conspiracy doctrine is sound law and should not be disturbed by this Court. However, even a cursory review of the facts alleged by Petitioners reveals a resounding failure to raise the issue of a conspiracy. The Court need not determine the propriety of the doctrine in this case because the allegations are insufficient to raise the issue of a conspiracy. Should the Court determine that there is sufficient evidence of a conspiracy and that the intra-corporate conspiracy doctrine does not exist or does not apply in this case, then the Defendants should be dismissed based upon qualified immunity grounds because such law was not clearly established at the time of the alleged acts.

## CONCLUSION

For the reasons set forth in this brief in opposition, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BRIAN J. BEGLE
State Bar No. 00785311
JOHN J. HIGHTOWER
State Bar No. 09614200
OLSON & OLSON
3485 Three Allen Center
333 Clay Street
Houston, Texas 77002
Telephone: (713) 759-0696
Facsimile: (713) 759-0342

*Attorneys for Respondents*

## APPENDIX A

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

## AFFIDAVIT

**BEFORE ME**, the undersigned authority, on this day personally appeared SAM NUCHIA, Chief of Police of the Houston Police Department, who after being sworn did depose and state as follows:

My name is Sam Nuchia. I am over eighteen years of age and competent to testify as to the matters asserted in this affidavit. I am Chief of the Houston Police Department and state the following facts based upon my personal knowledge. The facts are true and correct.

The Recruiting Division of the Houston Police Department is charged with doing background checks to insure the suitability of the applicants prior to hiring. Each member generally receives a Job Performance Review every six months for the duration of his tenure with the Houston Police Department to ensure this continued suitability and standard of performance.

When Debbie Benningfield and Peggy Frankhouser brought allegations of discrimination and mismanagement in the Identification Division of the Houston Police Department to me I did not hinder their attempts to have the claims investigated. I recommended that Ms. Benningfield forward her allegations to IAD for investigation. Later, I was informed that Ms. Benningfield filed the report with IAD. I felt that the decision to limit the IAD investigation to her allegations against A.W. Runnels and

to place allegations of mismanagement with the Inspections Division was a logical and reasonable method of handling the voluminous allegations raised by Ms. Benningfield.

My referral of Ms. Benningfield to the APC was not a disciplinary or negative act. The referral was provided for under state law and I believed it was necessary to determine her fitness for duty based upon information I had received through her chain of command and from other interested parties. The delay of Ms. Benningfield's promotion was made in order to await a determination as to her fitness for duty. Upon being found fit for duty, she was promoted as of the original date.

I issued a written reprimand to Ms. Benningfield based upon her absence from duty for a three day period and her failure to inform her supervisors of her whereabouts. This was a relatively minor discipline and consistent with other discipline I have issued for the same or similar infractions. The incident was properly reflected in her subsequent job performance review.

I personally met Ms. Frankhouser just prior to her retirement and discussed the internal problems of the Identification Division.

Based upon TCLEOSE RULE, § 211.81(j), Agency and Chief Administrator Reporting Responsibilities, on January 6, 1993, Officer Henry Womack sent a F-5 Termination Form notifying TCLEOSE that Pamela Grant was no longer employed with HPD, her sponsoring agency. This notification is required by state law and was done in the

normal course and scope of business of the Houston Police Department.

/s/ _____
SAM NUCHIA

**SUBSCRIBED AND SWORN TO BEFORE ME** by the same SAM NUCHIA on this 22nd day of October, 1996, to certify which witness my hand seal of office.

/s/ _____
V.E. Jackson
Notary Public in and for
The State of TEXAS